Compounding Quality Center of Excellence Annual Conference

Overview of the Draft Guidance: Prohibition on Wholesaling Under Section 503B of the FD&C Act

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Statutory Framework

Section 503B of the Federal Food, Drug, and Cosmetic Act (FD&C Act) provides conditions that must be satisfied for human drug products compounded by an outsourcing facility to be exempt from:

- Section 505 (concerning the approval of drugs under an NDA/ANDA);
- Section 502(f)(1) (concerning the labeling of drugs with adequate directions for use); and
- Section 582 (concerning drug supply chain security requirements).

One of the **conditions** that must be met for a drug product compounded by an outsourcing facility to qualify for the exemptions is that the drug will not be sold or transferred by an entity other than the outsourcing facility that compounded the drug, with certain exceptions

Statutory Text

- Section 503B(a)(8) Prohibition on Wholesaling:

"The drug will not be sold or transferred by an entity other than the outsourcing facility that compounded such drug. This paragraph does not prohibit administration of a drug in a health care setting or dispensing a drug pursuant to a prescription executed in accordance with section 503(b)(1)."

Rationale for the Wholesaling Prohibition

Reminder: Compounded drugs are not FDA-approved and have not been reviewed by the Agency for safety, effectiveness, or quality before they are marketed.

- Helps ensure that compounding is based on patients' needs
- Reduces the overall risk of patient harm and preserves the integrity of the U.S. drug approval process
- Preserves the integrity of the U.S. drug supply chain
- Preserves important distinctions between outsourcing facilities and conventional manufacturers, which generally engage in mass manufacturing of FDA-approved drug products

Draft Guidance: Prohibition on Wholesaling Under Section 503B of the FD&C Act

- This draft guidance, when finalized, will represent the current thinking of the FDA on this topic.
- There is a 60-day comment period for the guidance that began on the date the notice of availability was published in the *Federal Register*.
- The comment period ends on August 28, 2023.

Interpretation of Sale or Transfer

- Sale encompasses instances when an entity **other than** the outsourcing facility that compounded a drug has sold the drug
- Transfers encompass movements of the drug from one entity to another, regardless of whether the drug was sold as part of the transfer

Sold or Transferred - Policy

FDA generally does not intend to apply the wholesaling provision in instances when:

- A **common carrier** provides transportation services but does not take ownership of the product
- An outsourcing facility uses an **authorized third-party logistics provider (3PL),** which also does not take ownership of products, to provide or coordinate warehousing or other logistics services on behalf of the outsourcing facility

FDA generally does not intend to apply this provision to a compounded drug solely because it was moved:

(1) to a regulatory entity;
(2) to a returns processor for credit or disposition for destruction;
(3) to a waste disposal company;
(4) under a recall; or
(5) to or from a contract testing laboratory solely for testing purposes.

Sold or Transferred – Policy (cont'd)

- FDA generally does not intend to apply this provision to a compounded drug solely because it was moved as part of an **intracompany transfer** during shipment to an outsourcing facility's customer.
  - Including when an outsourcing facility sends drugs it compounded to a warehouse it owns or leases that is not located in the outsourcing facility that compounded the drugs for shipment to the outsourcing facility's customers.

Entities Other Than Outsourcing Facilities

- Generally, a drug compounded by an outsourcing facility is not eligible for the statutory exemptions under section 503B of the FD&C Act if the drug is sold or transferred by an "entity other than the outsourcing facility that compounded such drug."
- FDA interprets this phrase to refer to any entity that sells or transfers a drug compounded by an outsourcing facility, other than the outsourcing facility that compounded the drug, regardless of whether that entity has a physical address.
- As discussed in more detail in the upcoming slides, examples of "entities other than the outsourcing facility that compounded such drug" may include:
  - Outsourcing facilities that did not compound the drug being sold or transferred (but see section III.A.3. of the guidance)
  - Wholesale distributors
  - Repackers and relabelers
  - Marketing firms
  - Website owners and operators
  - Healthcare facilities (including virtual healthcare facilities)*
  - Pharmacies (including mail order pharmacies)*

* but see exception related to administration/ dispensing in section III.A.3. of the guidance)

Administration and Dispensing

- Section 503B(a)(8) of the FD&C Act provides that the prohibition on wholesaling "does not prohibit administration of a drug in a health care setting or dispensing a drug pursuant to a prescription executed in accordance with section 503(b)(1)."
- FDA interprets this provision to mean that a drug compounded by an outsourcing facility may be eligible for the exemptions in section 503B of the FD&C Act where the drug is distributed directly from an outsourcing facility to a health care facility, such as a hospital or clinic, where the drug is administered to a patient, or to a State-licensed pharmacy or Federal facility where the drug is dispensed pursuant to a prescription executed in accordance with section 503(b)(1) of the FD&C Act.
- As discussed further in the next slides, certain activities by a health care facility or pharmacy would not be considered to constitute administration in a health care setting or dispensing to a patient in accordance with section 503(b)(1).

In addition, the fact that a compounded drug is ultimately dispensed by a pharmacy or administered in a health care setting is not determinative of whether wholesaling (i.e., sales or transfers prohibited by section 503B(a)(8)) has occurred before that point, because ordinarily all prescription drugs are ultimately dispensed by a pharmacy or administered in a health care setting.

Activities Prohibited by the Wholesaling Provision (1 of 6)

- Scenario (a): An outsourcing facility distributes a drug it compounded to a **wholesale distributor** that sells or otherwise transfers the compounded drug product.
- Scenario (b): An outsourcing facility (A) compounds a drug and transfers the drug to a **second outsourcing facility** (B) for subsequent distribution (without obtaining a prescription in accordance with section 503(b)(1) of the FD&C Act) to customers. Outsourcing facilities (A) and (B) are owned by different entities and registered with FDA as separate outsourcing facilities.

Activities Prohibited by the Wholesaling Provision (2 of 6)

- Scenario (c): An outsourcing facility distributes a drug it compounded to another **manufacturer** (e.g., a repacker or relabeler) that sells or transfers the compounded drug.
- Scenario (d): An outsourcing facility distributes a drug it compounded to a **repacker or relabeler** (regardless of whether the repacker or relabeler actually repacks or relabels the drug) that sells or transfers the drug to another entity (e.g., a pharmacy, health clinic, or physician's office), which then dispenses the drug pursuant to a prescription in accordance with section 503(b)(1) of the FD&C Act.

Activities Prohibited by the Wholesaling Provision (3 of 6)

- Scenario (e): A **third party** (e.g., a marketing firm or operator of a website that is not a pharmacy) sells a drug compounded by an outsourcing facility, even though the third party does not take physical possession of the drug, by providing services (e.g., training, billing, advertising) to physicians that prescribe the drug and bundling the cost of those services with the cost for obtaining the drug.

Activities Not Prohibited by the Wholesaling Provision (4 of 6)

- Scenario (a): An outsourcing facility moves the drug product it compounded to another **location** (e.g., a warehouse) that is **part** of the **same outsourcing facility** (i.e., at the same address or geographic location) for subsequent distribution.
- Scenario (b): An outsourcing facility distributes a drug it compounded (without obtaining a patient-specific prescription) to a **health care professional** who **administers** it in a **health care setting** (e.g., in a hospital or the physician's office).

Activities Not Prohibited by the Wholesaling Provision (5 of 6)

- Scenario (c): An outsourcing facility distributes a drug it compounded (without obtaining a patient-specific prescription) to a **hospital or health system, health clinic, or physician's office**, and it is **administered** within that hospital or health system, health clinic, or physician's office.
- Scenario (d): An outsourcing facility distributes a drug it compounded (without obtaining a patient-specific prescription) to a **hospital or health system, health clinic, or physician's office** where it is used as office stock to **dispense** to **patients pursuant to prescriptions** in accordance with section 503(b)(1) of the FD&C Act.
- Scenario (e): An outsourcing facility distributes a drug it compounded to a **state-licensed pharmacy, federal facility, or licensed physician**, which subsequently dispenses the drug **pursuant** to a **prescription** in accordance with section 503(b)(1) of the FD&C Act.

Activities Not Prohibited by the Wholesaling Provision (6 of 6)

- Scenario (f): An outsourcing facility distributes a drug it compounded to an entity that provides healthcare services (e.g., a hospital or health system, health clinic, or physician's office) for administration in that health care setting based on pricing agreements the outsourcing facility negotiated with a third party (e.g., **group purchasing organization (GPO)**) acting on behalf of the healthcare services entity. In this example, the GPO only works on behalf of hospital and health systems, health clinics, and physicians' offices seeking multiple products produced by outsourcing facilities to facilitate business transactions by finding products based on availability and competitive pricing. The GPO does not own drugs, ship drugs, warehouse drugs, handle drugs, or hold drugs. The GPO does not sell or dispose of drugs. The GPO does not purchase, or decide to purchase, drugs. GPO members independently decide when and how much (if any) drugs to purchase from the outsourcing facility with which the GPO has an agreement.
- Scenario (g): An outsourcing facility **dispenses** its compounded drugs in accordance with section 503(b)(1) of the FD&C Act to **patients** of a **third party** (e.g., a health clinic) after receiving **patient-specific prescriptions** for the patients from the third party and its affiliated medical providers. The third party does not receive any type of compensation and does not sell or transfer the drugs compounded by the outsourcing facility.

Inspections and Regulatory Action

- During inspections of outsourcing facilities, FDA reviews records, such as contractual agreements, distribution data, shipment data, and customer lists to evaluate compliance with the wholesaling prohibition.
- FDA may consider regulatory action against the outsourcing facility for drugs that are not compounded in accordance with the conditions of section 503B of the FD&C Act because they are then subject to the requirements of sections 505, 502(f)(1), and 582 of the FD&C Act.
- Similarly, the third party that sold or transferred the outsourcing facility's drug products may be subject to regulatory action for distributing or causing the distribution of drug products that violate the FD&C Act.

Questions?